

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Dave Erlanson, Sr., Individual,
Swan Valley, Idaho,

Respondent.

DOCKET NO. CWA-10-2016-0109

**MOTION TO COMPEL ADDITIONAL
DISCOVERY AND COMPLIANCE WITH
SECOND PREHEARING ORDER**

Pursuant to 40 C.F.R. § 22.19(e) of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (“Part 22 Rules”), Complainant Environmental Protection Agency (“Complainant” or “EPA”) respectfully submits this Motion to Compel Additional Discovery and Compliance with Second Prehearing Order. Specifically, EPA seeks additional discovery related to the economic benefit that resulted from Respondent Dave Erlanson, Sr.’s (“Respondent”) noncompliance with Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), and Respondent’s ability to pay the proposed penalty. EPA requests the Presiding Officer compel Respondent to respond to the Requests for Information and Requests for Production that are included as Attachment A within 14 days of an Order granting this Motion. Additionally, EPA requests the Presiding Officer compel Respondent’s compliance with the Second Prehearing Order (Docket No. 19), dated February 24, 2017, and require that Respondent provide, within 14 days of an Order granting this

Motion, a brief narrative summary of the expected testimony for each witness he intends to call at hearing and the curriculum vitae or resume for each expert witness.

Pursuant to the Presiding Officer's November 5, 2018, Notice of Hearing Order, EPA's counsel has attempted to confer with Respondent but those attempts were unsuccessful.

A. Motion to Compel Additional Discovery

Despite requests from EPA and the Presiding Officer for information regarding Respondent's economic benefit of noncompliance and ability to pay the proposed penalty in this matter, Respondent has failed to produce such information. EPA now requests the Presiding Officer to compel production of that information to prevent surprise and the resulting inefficiencies at hearing.

The Presiding Officer may order additional discovery if the request: (1) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (2) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 C.F.R. § 22.19(e)(1).

EPA's request satisfies these criteria. The proposed Requests for Information and Requests for Production will not delay the proceeding or burden Respondent, because the requests are focused, simple, and few. EPA seeks information regarding only two material issues: (1) the amount and value of gold and other metals Respondent removed from the South Fork Clearwater River on July 22, 2015, and (2) Respondent's ability to pay the proposed penalty. Both requests seek the type of information only Respondent is likely to possess.

Thus far, Respondent has refused to provide the requested information voluntarily. The Presiding Officer's Second Prehearing Order required that Respondent provide (1) all factual information and documentation relevant to the assessment of a penalty and (2) if Respondent takes the position that he is unable to pay the proposed penalty, a detailed narrative statement and copy of any documents in support of his position. Docket No. 19, p. 3. Similarly, EPA's Initial Prehearing Exchange noted the lack of information relevant to Respondent's financial gain and stated, "Complainant has no information indicating that Respondent is unable to pay a penalty up to the statutory maximum." Docket No. 23, p. 23. While Respondent admitted to receiving an economic benefit from his mining activities (Answer ¶ 4.8), he did not provide any details in his Prehearing Exchange (Docket No. 26, p. 13), and has failed to supplement in accordance with 40 C.F.R. § 22.19(f). Similarly, Respondent has failed to provide either a narrative statement or any documents in support of an inability to pay, nor has he raised such a claim in his Prehearing Exchange.

EPA seeks the requested information because Respondent's economic benefit and ability to pay are probative in determining an appropriate penalty in this case. The Part 22 Rules require the Presiding Officer to determine the appropriate penalty amount in accordance with the criteria set forth in the applicable statute. 40 C.F.R. § 22.27(b). Among the statutory penalty factors applicable to this case are the "economic benefit or savings (if any) resulting from the violation" and the "ability to pay." CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3).

If Respondent continues to ignore EPA's and the Presiding Officer's requests for information related to his economic benefit and ability to pay, Respondent should not be permitted to benefit from the surprise of introducing such information at hearing. *In re Gerald Strubinger*, Dkt. No. CWA-3-2001-001, ALJ (July 12, 2002) (requiring the production of

documents “in sufficient time to allow Complainant to review the records and prepare for hearing”); *In re Andrew B. Chase*, Dkt. No. RCRA-02-2011-7503, ALJ (May 11, 2012).

Pursuant to 40 C.F.R. § 22.19(g), where a party fails to provide information within its control, as required by the Part 22 Rules, the Presiding Officer may, in her discretion: “(1) [i]nfer that the information would be adverse to the party failing to provide it; (2) [e]xclude the information from evidence; or (3) [i]ssue a default order under § 22.17(c).” Should Respondent fail to provide any additional information regarding his economic benefit of noncompliance or ability to pay, EPA respectfully requests the Presiding Officer exclude any such evidence introduced at hearing and infer the withheld information would demonstrate that (1) Respondent received some undetermined economic benefit from his noncompliance and (2) Respondent has the ability to pay the proposed penalty in the amount of \$6,600.

B. Motion to Compel Compliance with Second Prehearing Order

Respondent’s Prehearing Exchange (Docket No. 26) failed to summarize adequately the expected testimony of Respondent’s witnesses and excluded the resumes of expert witnesses, in violation of 40 C.F.R. § 22.19(a)(2) and the Second Prehearing Order (Docket No. 19). EPA requests the Presiding Officer compel Respondent’s compliance with the Second Prehearing Order and require that Respondent provide an adequate summary of each expected testimony and resumes for each expert witness.

Pursuant to 40 C.F.R. 22.19(a)(2), each party’s prehearing information exchange shall contain, *inter alia*, “the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony.” Additionally, the Second Prehearing Order required each party to file, *inter alia*, “a list of names of the expert and other

witnesses intended to be called at hearing” and “a brief narrative summary of their expected testimony.” Docket No. 19, p. 2.

While the Part 22 Rules do not define a “brief narrative summary of expected testimony,” this Tribunal has explained that the purpose of the requirement is to prevent surprise and inefficiency at hearing. *In re Pekin Energy Co.*, Dkt. No. 5-EPCRA-95-045, ALJ (Mar. 25, 1997). “The summaries of testimony must convey sufficient information concerning the witnesses' connection to the case at hand, to notify the opposing party of the general substance and context of the testimony of each witness.” *In re Alan Rickey, Inc.*, Dkt. No. CWA-06-2004-1903, ALJ (Aug. 18, 2005) (citing *In re Henry Velleman*, Dkt. No. 5-CAA-97-008, ALJ (Mar. 18, 1998)).

In Respondent’s Prehearing Exchange, he identified four witnesses: Joseph Greene, Dave Erlanson, Clark Pearson, and Ron Miller. Docket No. 26, p. 1-2. Respondent failed to provide an adequate narrative summary for each. For Joseph Greene, Respondent stated, “He will testify as to the nature and mechanisms of suction dredging relevant to this case and whether such activities result in the addition of pollutants to the rivers in which such dredging occurs, as well as the impact caused or not caused by such activities as well as related subjects.” Docket No. 26, p. 2. Similarly, Respondent describes Mr. Pearson’s testimony as “the nature and manner of small scale suction dredge mining, the manner in which the equipment works, the nature of any discharge from such dredges, and related matters.” Respondent’s broad descriptions fail to describe how each witnesses’ testimony relates to the sole issue to be addressed at hearing: an appropriate administrative penalty for Respondent’s violation of the CWA. Additionally, Respondent failed to provide any narrative summary describing the testimony he intends to elicit

from Mr. Miller or himself. EPA is therefore unable to prepare its examination of these witnesses.

Respondent also failed to identify expert witnesses and provide their credentials. In addition to the narrative summary, the Second Prehearing Order required that Respondent identify each witness as a fact witness or an expert witness and provide a curriculum vitae or resume for each identified expert witness. Docket No. 19, p. 2. Respondent failed to clarify whether any witness would testify as a fact witness or expert witness. Docket No. 26, p. 1-2. If Respondent intends to elicit expert testimony from any of the listed witnesses, he also failed to include each expert's resume or curriculum vitae. EPA is therefore unable to assess the qualifications of the expert witnesses listed, if any.

Accordingly, EPA requests the Presiding Officer compel Respondent to provide, within 14 days of an Order granting this Motion, adequate narrative summaries for each witness he intends to call at hearing and the resume or curriculum vitae for each expert witness. If Respondent fails to remedy the omissions in his Prehearing Exchange, EPA respectfully requests the Presiding Officer exclude the testimony of each witness for which an adequate summary has not been provided, in accordance with 40 C.F.R. §§ 22.19(a)(1) and (g).

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Presiding Officer grant EPA's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, and require that, within 14 days of an Order granting this Motion, Respondent (1) respond to the attached Requests for Information and Requests for Production and (2) provide adequate

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narrative summaries of the expected testimony of each witness and the curriculum vitae or resume of each expert witness.

Dated this 14th day of December, 2018.

Respectfully submitted,

/s/ J. Matthew Moore

J. Matthew Moore
Assistant Regional Counsel
U.S. EPA, Region 10

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MOTION FOR ADDITIONAL DISCOVERY**, dated December 14, 2018, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

The undersigned also certifies that on this date she served the foregoing **MOTION FOR ADDITIONAL DISCOVERY**, via regular US Mail, postage prepaid, on Mark Pollot, Attorney for Respondent Dave Erlanson, Sr., at 772 E. Lava Falls St., Meridian, Idaho 83646 and via email at conresctr@cableone.net and via regular US Mail, postage prepaid, on Dave Erlanson, Sr., Respondent, at PO Box 46, Swan Valley, Idaho 83449.

Dated this 14th day of December, 2018.

/s/ Shannon K. Connery

Shannon Kaye Connery
Paralegal Specialist
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Sixth Avenue, Suite 155, M/S ORC-113
Seattle, WA 98101
(206) 553-1965